

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

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P15
75-1222

To be argued by
NEAL J. HURWITZ

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee.

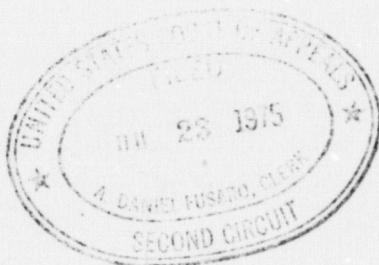
vs.

ALBERT LEVY,

Defendant-Appellant.

*On Appeal from the United States District Court for the
Southern District of New York*

BRIEF AND APPENDIX FOR APPELLANT



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

UNITED STATES OF AMERICA

Appellee

Docket No.

75-1222

-against-

ALBERT LEVY

Defendant-Appellant

-----x

BRIEF AND APPENDIX OF APPELLANT
ALBERT LEVY

PRELIMINARY STATEMENT

Albert Levy appeals from a judgment of conviction entered against him in the United States District Court in the Southern District of New York on May 30, 1975 following a four day trial before the Honorable Robert J. Ward and a jury. Levy was found guilty of violating the bribery and gratuity statutes, 18 U.S.C. §§201(b) and 201(f). Levy received a sentence of six months imprisonment and a fine of \$5,000. Defendant is presently enlarged on bail pending appeal.

STATEMENT OF FACTS

During June 1974, Internal Revenue Agent Anthony Midgette was assigned by his group supervisor to conduct an audit of the 1972 income tax return of defendant Albert Levy (tr. pp. 18-20).*

Midgette testified that this return was not pulled for audit in the usual manner. Midgette was advised that it was pulled manually (not by computer) after the Internal Revenue Service had been informed by Consolidated Edison that Levy had sold to Con Ed nonauthentic Yale locks and that Levy had attempted to bribe a Con Ed employee (tr. pp. 192-94).

After being assigned, Midgette, on June 6, 1974, sent out a letter notifying Levy of the audit. Levy responded by telephone and asked Midgette what records were needed, to which Midgette replied the gross receipts book, the general ledger and any other records used to prepare the return (tr. pp. 18-24). On July 16, 1974, Levy went with his accountant Morris Franco to the IRS office in Brooklyn to meet with Midgette. At this conference, Franco gave to Midgette the monthly bank statements used to arrive at the income figure contained in Schedule C in the

* Page references in this Brief are to the stenographic record of this trial.

return. The bank statements were of the Levy family owned enterprise called Guarantee Lock Company, which was in the business of selling locks and door hardware. Midgette was told that defendant owned the business for the last four months of 1972. For the first eight months of 1972, the company was owned by Levy's parents, Susie and Isaac (24-28).

At this first conference, Midgette was advised that defendant had no other personal or business checking accounts. Midgette asked Franco for any other books and records reflecting income, and Franco stated that he had a sales journal, but that he did not use it to make up the income figures on the return. (29).

Midgette also asked Franco for Levy's parents' return for 1972 and to bring with him to the next meeting any personal savings books, brokerage statements and anything of the parents that he may have.

At this first conference, Midgette next went to the amount of purchases contained in Schedule C. The agent prepared a list of purchases from the cancelled checks of Guarantee and asked Franco to produce matching purchase invoices for the next meeting (29). They then proceeded to discuss Schedule D on the return, which showed stock transactions amounting to a net long term capital loss of approximately \$2,200. An identical loss was taken by Levy's parents on their

joint return (30-32).

Midgette requested that Franco bring all brokerage statements to the next meeting. Midgette was further told at this first meeting that the deposits contained in the last four months of the Guarantee bank statements represented the gross income figure on Schedule C of the defendant's return (34-36).

Midgette next met with Franco on July 26, 1974, and again on August 2, 1974 at the IRS in Brooklyn (40). Levy did not attend these two conferences.

On August 5, 1974, Levy called Midgette and said that Franco was costing him a lot of money, that the accountant had already seen Midgette 3 times on the audit and he wanted to know what he could bring to Midgette to speed up the audit. Midgette replied that he wanted sales invoices, and any other books and records not previously given, and said that he had figured, based on the records given to him by Franco that Levy and his parents had a \$5,400 capital gain and not a loss as indicated in Schedule D. In this telephone conversation, Midgette also told Levy that Franco's work papers, which had previously been given to Midgette, showed purchases of \$299,000, but the return had purchases of only \$259,000. Thus, the accountant had "knocked off" \$40,000 worth of expenses and Midgette wanted an explanation. Levy said he did not know the

reason for the discrepancy since he had not seen the accountant's work papers. Midgette also told Levy that the gross receipts in Schedule C did not correlate with the deposits in the monthly bank statements, to which Levy responded, according to Midgette, that he padded the monthly figures. They then set a date for Levy to come in to confer with Midgette on the morning of August 8 (41-47).

Midgette testified that, at 9:30 A. M. on August 8, Levy and Midgette met at the IRS building in Brooklyn. They went into a conference room where Levy gave Midgette sales invoices which they attempted to match up with items listed in the sales journal. They proceeded to go through the sales journal and the amounts did not correlate with the bank deposits (47-52). Midgette then prepared a list of sales invoices based on the items in the sales journal which he wanted Franco to bring with him for the next proposed meeting. Levy and Midgette next discussed the taxpayer's stock transactions, and from the records previously furnished to Midgette by Franco, Midgette had arrived at a \$5,200 long term capital gain, one-half of which belonged to Levy (52-57).

Midgette testified that, at this point in the conference, Levy placed his head in his hands and said, "I don't know how to do this. I never done this before," reached into his pocket, put something on the desk and

stated it was \$1,000 to stop the audit and for Midgette to give him a "no change." (58). Midgette said he could use the money since he was getting married soon, and Levy offered to give him the money right in the conference room. Midgette replied that he could not take the money there and Levy asked him to go outside. Levy then got up, took a sheet of paper from a pad and asked for the restroom. He returned shortly, put a piece of paper on the desk, said it contained \$1,000, which Midgette refused. Levy asked to meet with him later and Midgette said they could meet at a Chinese restaurant in Brooklyn at 6:00 P. M. on that day (57-59). At 3:00 P. M. that afternoon, Midgette called Levy. This conversation was recorded. Levy said he was nervous, and Midgette indicated that they should meet at Stark's Steak House on Lower Broadway in Manhattan, which was agreed to by Levy (61-63).

At 7:00 P. M., on August 8, Midgette met Levy at Stark's. The conversation was recorded by Midgette. Midgette testified that, during the dinner conversation, Levy passed \$1,000 cash to him under the table, which Midgette put in his pocket. At the end of this conversation, in the vestibule of the restaurant, Midgette counted out the money, which consisted of ten \$100 bills (71-77).

On cross-examination, Midgette testified that Levy's return was not pulled by the computer, but that his supervisor had told him that the IRS had been informed by Consolidated Edison that Levy had sold to Con Ed some nonauthentic Yale locks and, further, Con Ed had advised IRS that Levy had attempted to bribe a Con Ed employee. Con Ed further advised the IRS that Con Ed suspected Levy was under-reporting income (192, 194). Further, on cross-examination, Midgette testified that the conference with Levy lasted from 9:30 A.M. to 1:00 P.M. and, after Levy left, Midgette called Internal Inspection and reported a bribe attempt (199). Midgette said that Levy put money on the table toward the end of the session and that they never discussed the amount of taxes that was due and owing (206, 211).

Midgette prepared an affidavit for inspection immediately after the alleged bribe by Levy on August 8, and, in that affidavit, Midgette stated, in substance, that a few minutes after 9:30 Levy offered him money to stop the audit. On cross-examination, he conceded that the few minutes may very well have been two and one-half hours after the conference began. (218-222).

Midgette further testified on cross that Levy told him on August 8 that, "I have looked you straight in the eye, I wasn't trying to hit you over the head on this stuff and I just don't understand it." (223).

Defendant testified in his own behalf. He stated that his father died in June of 1973 of cancer and that Mr. Franco had been the accountant for Guarantee for at least 30 years (301). Defendant's father started the business in 1928 (302). Levy became the owner of the business in August 1972 during his father's illness. While alive, his father kept the books and records and the only records kept were the sales journal (ledger), monthly bank statements, cancelled checks and sales and purchase invoices (305-306). The accountant prepared the income tax returns solely from the monthly bank statements, using the deposits for determining gross income and the cancelled checks for all purchases. (306-307). According to Mr. Levy, every single book and record available was given to Midgette during the audit (315). Schedule D on the return was prepared by the accountant from confirmations which Levy had given to him. These confirmations were later lost or destroyed when the store was burglarized on New Year's Eve 1973-74 (324). This burglary was reported to the police.

Levy testified that, after Midgette requested documentation as to 1972 stock transactions, he personally went to his broker to get whatever records were available. Levy did obtain certain records from the broker, and he, in turn, gave them to Franco, who passed them on to Midgette (333-334). Levy further

testified that, during 1972, he attempted to sell stock in two companies and received a letter from his broker stating that the shares could not be sold since there was no available market at that time in those stocks (338).

Levy testified that, after his accountant had been to see Midgette three times, he called Midgette and said that he had given everything to his accountant and wanted to make an appointment to see Midgette himself (345-346). On August 8, at 9:30 A.M., Levy personally had a conference with Midgette at the IRS and he brought with him all sales invoices which he had and which Midgette had not seen to that point. Everything else had been previously given or shown to Midgette (347). At this conference, Levy had with him only \$125 to \$150 in cash and some blank checks of Guarantee. At this conference, Midgette and Levy were in a cubicle and Levy testified that there was another taxpayer in front of him in a cubicle and that he was able to hear what was being said in that audit (347-349). Levy told Midgette that he had no more by way of documentation (350).

During this conference, Levy showed Midgette the invoices. They also went over the 1972 stock transactions. Midgette said there was a \$4,000 gain, \$2,000

of which was attributable to Albert and \$2,000 of which was attributable to his parents. Even though Midgette's figures were shown to Levy, he was certain his family lost money in the stock market. In going over the sales invoices against a list prepared by Midgette, it was determined that Levy did not have all the invoices. Midgette told him to go out and get duplicates, to which Levy responded that that would be impossible (353). About 12:30 in the afternoon, Levy asked Midgette how much he owed and Midgette said about \$1,000. Levy replied that he wanted to settle for \$1,000 and offered to pay immediately. Levy reached into his pocket for a blank check to settle the case and Midgette said no, that he wanted to go over his figures again and that he would call back after he had done so. Just prior to Levy's leaving the conference, Midgette said, "Bring cash." (360-362).

Midgette called Levy, who was at his place of business, at 3:00 that afternoon. Levy testified that he was hoping Midgette would never call and that he was extremely nervous and that he so told Midgette (364). After the call from Midgette, Levy went and got \$1,000 in cash, and went to a bank to change the currency into ten \$100 bills (365). That night, Levy and Midgette met at Stark's Steak House and Levy gave Midgette the money in the vestibule of the restaurant (367). Levy testified that he had never been audited before by the IRS (370).

ARGUMENT

THE INDICTMENT MUST BE DISMISSED BECAUSE ENTRAPMENT WAS ESTABLISHED AS A MATTER OF LAW

It is conceded that appellant gave agent Midgette \$1,000 on the evening of August 8, 1974. It is further conceded that the trial judge gave the jury appropriate instructions, both on inducement and on predisposition (499-502), pursuant to the guidelines in United States v. Russell, 411 U.S. 423 (1973), and United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974). We urge, however, that leaving the issue of entrapment to the jury in this case was insufficient and that the indictment should have been dismissed by the trial court.

We recognize that in the normal case involving the defense of entrapment where there is insufficient credible evidence absent the testimony of the appellant himself to sustain the defense, the issue is left to the jury to decide under proper instructions. See United States v. Rosner, supra, 485 F.2d at 1222; Osborn v. United States, 385 U.S. 323 (1966). In the instant case, it is submitted that the facts demonstrate that, but for the government's inducement, appellant would not have engaged in the criminal con-

duct charged. Moreover, unlike the facts in Rosner, where the defendant engaged in similar conduct in a number of cases to establish his predisposition to commit the crime involved, we do not have that predisposition herein. See United States v. Rosner, supra, 485 F.2d at 1222.

The facts leading to the indictment are fully set forth in the Statement of Facts. It is clear that, but for Consolidated Edison requesting IRS to pull Levy's return for audit, the criminal conduct would not have occurred. As was previously stated, Con Ed initially advised the IRS that the appellant had attempted to bribe a Con Ed employee and that he may very well attempt to bribe an IRS agent if an audit were conducted.* The IRS acted on this request by manually pulling Levy's 1972 return for audit, not, it is submitted, to determine whether additional taxes were owing, but to see whether Levy would, indeed, attempt to offer money to

* Con Ed's conduct herein was not done for altruistic reasons. Con Ed was then involved with Levy in a civil dispute involving nonpayment by Con Ed of delivered goods from Guarantee Hardware. Con Ed, in a vindictive series of actions, not only went to the IRS about Levy, but also the F.B.I., the City Department of Investigation and the Queens District Attorney's Office. These facts, though not included in the Record on Appeal, were contained in the presentence report submitted to Judge Ward. Judge Ward specifically stated for the record that he would not consider such bare allegations by Con Ed in imposing sentence on Levy.

the auditing agent. The pulling of the Levy return manually indicates that the intent of the IRS was not to perform its legitimate function of collection of taxes, but to see whether it could induce an unlawful payment of money to the agent doing the audit. We submit that such conduct constitutes unlawful entrapment. See Kadis v. United States, 373 F.2d 370 (1st Cir. 1967).

The manner in which the audit was, in fact, conducted strongly indicates that the IRS may very well have had a preconceived plan to coerce an unlawful payment from Levy. During the course of the audit, Levy's accountant had been to see the agent on three occasions and a fourth conference had been arranged. Every single book and record of Guarantee Lock Co. had been provided. Indeed, appellant personally went to his brokerage firm to obtain requested documents when these papers had been previously destroyed in a burglary. The requests by the agent were impossible to fulfill. The conduct of the agent is understandable only in terms of his attempting to induce the crime charged, particularly since agent Midgette testified that he personally had been told by his supervising agent that appellant may attempt a bribe as he allegedly had previously done to a Con Ed employee. Sound law enforcement does not require the

use of the methods employed here.

In United States v. Mathues, 22 F.2d 979 (E.D. Pa. 1927), agents assigned to watch a brewery for criminal violations were offered an unsolicited bribe by the defendant's brother. One of the agents told the brother that he wanted to deal with the defendant, not the brother. The defendant then met with the agents and agreed to pay a bribe. The Court held that the agents had entrapped the defendant as a matter of law. Thus, if the original suggestion for a bribe comes from government agents or from a third party whose suggestion is favorably received by government agents, then a defendant who agrees to the suggestion has been entrapped as a matter of law, unless there is evidence of predisposition other than the mere fact that the defendant agreed to give the bribe without signs of reluctance.

We submit that under the facts herein the same result should occur.

CONCLUSION

The conviction of Albert Levy should be reversed, and the indictment dismissed.

RESPECTFULLY SUBMITTED

Dated: New York, N. Y.
July 23, 1975

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New York, New York 10022

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA

INDICTMENT

-v-

S 75 Cr. 310

ALBERT LEVY

Defendant

-----x

COUNT ONE

The Grand Jury charges:

On or about the 8th day of August, 1974, in the Southern District of New York, ALBERT LEVY, the defendant, unlawfully, wilfully and knowingly, directly and indirectly, corruptly did give, offer and promise things in value, to wit, approximately \$1,000.00, to a public official, who was then employed as an Internal Revenue Agent by the Internal Revenue Service of the United States Treasury Department, with intent to influence official acts of said public official and to induce said public official to do and omit to do acts in violation of his lawful duties in the performance of the audit examination of the defendant's 1972 individual federal income tax return, and the report of said audit.

(Title 18, United States Code, Section 201(b))

COUNT TWO

The Grand Jury further charges:

On or about the 8th day of August, 1974, in the Southern District of New York, ALBERT LEVY, the defendant, unlawfully, wilfully and knowingly, otherwise than as

provided by law for the proper discharge of official duties, did directly and indirectly give, offer and promise things of value, to wit, approximately \$1,000.00, to a public official, who was then employed as an Internal Revenue Agent by the Internal Revenue Service for the United States Treasury Department, for and because of official acts performed and to be performed by said public official, to wit, the audit examination of the defendant's 1972 individual federal income tax return.

(Title 18, United States Code, Section 201(f))

FOREMAN

PAUL J. CURRAN
United States Attorney

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

* * *

Midgett-direct

rdsrm 3

Q You say half belonged to Mr. Levy and half belonged to his parents?

A Yes.

Q That would be roughly \$2600 for each; is that correct?

A Yes, that is correct. While sitting there Mr. Levy then placed his hands -- I mean his head in his hands and he said, "I don't know how to do this. I never done this before."

Q What happened then?

A Then he reached in his pocket, took it out and placed on the desk in front of me.

Q What did you do, if anything, in response to that?

A I asked him what was it. He said it was \$1000 where I could stop the audit where I was at that point and give him a no change. I then said --

Q I will stop you for a minute. What do you understand the word "no change" to mean?

A No change means to accept a person's tax return as filed. There is no increase or decrease in the tax liability.

Q That is, you accepted the return just as the person filed it, you don't add any additional tax and you don't subtract any tax; is that correct?

* * *

rdsrm

Midgette-cross

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checks with the figures contained in Franco's work papers?

A At the time I did my test check I wasn't aware of the discrepancy until later.

Q And did you investigate further?

A I never had a chance to.

Q Could you explain to the jury, Mr. Midgette, why Albert Levy's return was audited and not his mother and father?

A Albert Levy's return was audited or was given to me by my supervisor. He wasn't pulled by computer. Like they have different methods of pulling tax returns. He was pulled under a method not used by the computer.

Q You don't know why Albert was pulled and why Susie's and Isaac's was not pulled?

A I was told by my supervisor why it was pulled.

Q Why was it pulled?

A One, he stated that -- my supervisor stated that Mr. Levy had fraudulently -- these are my supervisor's words -- has fraudulently purchased Yale locks from Portugal and sold to Con Ed as authentic Yale locks and that he had attempted to bribe a Con Ed employee and that it was possible money was funneling through a bank in Mexico.

Q Your supervisor had Levy's return pulled because Con Edison contacted Internal Revenue and said that Mr. Levy

1 rdsrm

Midgette-cross

193

2 was guilty of some fraud on Con Edison; is that what you
3 have said?

4 MR. SCHATTEN: Your Honor, I object. He is
5 entitled to ask him what his supervisor told him. Unless
6 you bring out that this witness --

7 THE COURT: I think the question is objectionable
8 as to form.

9 Q Well, now, did your supervisor tell you that
10 Albert Levy's return, and not that of his mother's and
11 father's, was pulled because Con Ed had contacted, Consoli-
12 dated Edison had contacted the Internal Revenue Service
13 about some dealings that Albert Levy had had with Con Edison?

14 A My supervisor got his information through the
15 Inspection Service.

16 THE COURT: That was not the question. The
17 question was what, if anything, did your supervisor tell you
18 regarding why Albert Levy's return was taken for audit or
19 picked up for audit?

20 THE WITNESS: Well, he said the locks that Mr.
21 Levy sold to Con Ed were not authentic Yale locks. If he
22 sold them for \$200,000, his profit should have been very high,
23 for the low cost. In other words, he sold the locks at
24 \$200,000 and they were not authentic Yale locks. The cost
25 was very low, so the profit should have been high.

rdsrm

Midgette-cross

194

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2 Q And the Internal Revenue Service investigated
3 Albert Levy because Con Edison said that Levy was selling
4 Portuguese locks to Con Ed and that was the reason for this
5 audit?

6 A It was suspected that he had under-reported
7 his income.

8 Q Con Ed told Internal Revenue that Con Ed
9 suspected that Albert Levy was under-reporting his income?

10 MR. SCHATTEN: Objection.

11 THE COURT: Sustained.

12 Q Did your supervisor tell you that?

13 A In essence.

14 Q Let me ask you this: Does Consolidated Edison
15 have any greater power or force over the Internal Revenue
16 Service than Mr. Schatten or I or any member of this jury?

17 MR. SCHATTEN: I object, your Honor. This is
18 clearly a most objectional question, as Mr. Hurwitz knows.

19 THE COURT: Sustained. Let's not have any
20 comments. You made an objection. The Court sustained it.

21 Next question.

22 Q Therefore, based on what you have told this jury
23 the audit that you conducted, and particularly the source
24 from which it came from, would you say that this was a
25 normal audit of Albert Levy?

* * *

Q And did you say in that affidavit that, "At approximately 9:30 a.m. today Levy came alone at the Brooklyn District Office and we met in the conference room. After a few minutes of conversation about the audit, Levy showed me a stack of money, told me it amounted to above \$1000 and offered it to me to stop the audit and accept his return as filed"? Did you state that in this affidavit?

A If it is in the affidavit I said it.

Q Was it truthful when you said that?

A The truth is the same thing.

Q Was it truthful when you said a few minutes after 9:30 a.m. in the morning that Levy gave you \$1000?

A I wasn't watching the time, a few minutes or whatever. But it did happen.

Q Is that your signature, Mr. Midgette?

MR. SCHATTEN: Can we have a statement pursuant to United States v. Gardner?

MR. HURWITZ: About what?

MR. SCHATTEN: About the source.

MR. HURWITZ: I was given this by the U.S. Attorney's Office, if that is what you mean.

THE COURT: You now have a statement.

Ladies and gentlemen, the United States Attorney furnished a copy of this affidavit to Mr. Hurwitz.

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Midgette-cross

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Q Is that your signature on Exhibit I?

A Yes, it is.

Q Was it sworn to by you under penalties of perjury on the 8th of August, 1974?

A Yes.

Q And was it witnessed by Arthur Findley and another inspector named St. Sure?

A St. Sure, yes.

MR. HURWITZ: I offer Exhibit I into evidence.

MR. SCHATTEN: No objection.

THE COURT: Received.

xx (Defendant's Exhibit I received in evidence.)

MR. HURWITZ: May I show this to the jury?

THE COURT: Read it to the jury. It takes too long the other way.

MR. HURWITZ: "Affidavit, United States of America, Southern District of New York.

"I, Anthony L. Midgette, state that I reside at 745 Van Siclen Avenue, Apt. 2R, Brooklyn, New York. I am employed as an Internal Revenue Agent, GS-9, with the Brooklyn District Office and have been so employed since April 14, 1972.

"On June 6, 1974 I was assigned to audit the 1972 Form 1040 Income Tax Return of Albert Levy, 2116 Bergen

1 rdsrm

Midgette-cross

220

2 Avenue, Brooklyn, New York. I first met with Levy con-
3 cerning this audit at the Brooklyn District Office on July
4 16, 1974. During this meeting Levy was represented by Mr.
5 Morris Franco. I followed normal audit procedure during
6 this meeting. On Monday, August 5, 1974, Levy telephoned
7 me and requested a meeting at the office for 9:30 a.m. on
8 August 8, 1974. At approximately 9:30 a.m. today, Levy
9 came alone at the Brooklyn District Office and we met in
10 the Conference Room. After a few minutes of conversation
11 about the audit Levy showed me a stack of money, told me it
12 amounted to above \$1,000.00" --

13 MR. SCHATTEN: I think you are misreading it.

14 THE COURT: You said "above."

15 MR. SCHATTEN: I believe that is the agent's
16 initials.

17 THE COURT: It could be almost anything. Let's
18 show it to the witness.

19 Could you tell us what appears above the sum
20 \$1,000.00, Mr. Midgette?

21 THE WITNESS: This is my initials.

22 MR. HURWITZ: I see. It looked like "above."
23 I will repeat it.

24 "After a few minutes of conversation about the
25 audit Levy showed me a stack of money, told me it amounted

1 to \$1,000.00, and offered it to me to stop the audit and
2 accept his return as filed. I told Levy I was afraid to
3 accept money in the building. Levy then asked me to go
4 outside and he would hand me the money there. I told him I
5 couldn't go outside at that time as I had another meeting
6 scheduled. Levy told me he wanted to get this over with
7 today and asked me to meet him after work. I agreed to
8 telephone him at his place of business between 2:30 p.m. and
9 3:00 p.m. today to confirm a mutually acceptable meeting
10 place for tonight."
11

12 "I have read the foregoing statement consisting
13 of this page only and it is true and accurate and complete
14 to the best of my knowledge and belief and I made the
15 corrections shown and placed my initials thereof."

16 Q Now, on August 8 when you made this affidavit
17 your memory was a little better than when you testified here
18 yesterday?

19 MR. SCHATTEN: I object, your Honor.

20 THE COURT: Let the witness answer it if he can.

21 A My memory was a little clearer since it just
22 happened that same day.

23 Q And was it truthful when you said in this
24 affidavit and would your memory have been better when you
25 said it, that a few minutes after Levy came in at approxi-

1 rdsrm

Midgette-cross

222

2 mately 9:30 a.m. he offered you \$1000?

3 MR. SCHATTEN: I would object to the form,
4 your Honor.

5 THE COURT: Overruled.

6 A I said a few minutes. I don't know. I could
7 have been an hour or so. I said a few minutes though.

8 Q What about two and a half hours, Mr. Midgette?

9 A It could have been.

10 Q Now, Mr. Midgette, you testified that you
11 called Mr. Levy at around 3 o'clock at his place of business,
12 and that phone call was recorded?

13 A Yes.

14 Q What type of recording device did you have?

15 A I did not have a recording device. Some device
16 was hooked to the phone which I was talking from.

17 Q Mr. Levy did not know he was being recorded?

18 A Not to my knowledge.

19 Q And did Mr. Levy say to you at the very beginning
20 of that conversation, "I'll tell you one thing: I'm
21 breathing a little heavy. I was getting a little nervous"?

22 A Yes.

23 Q Did he previously say to you when you asked for
24 him, "Oh, man, I'll tell you, it is me," did he tell that
25 to you?

rdsrm

Midgette-cross

223

1

2

A He did say that.

3

Q Do you know in what type of voice he said that

4

to you?

5

A Like he did not want me to be talking to anyone

6

else but him.

7

Q It was more like --

8

MR. SCHATTEN: Your Honor, please --

9

MR. HURWITZ: May I proceed?

10

MR. SCHATTEN: May he finish his answer?

11

THE COURT: I thought he had.

12

The witness nods. He obviously had. Next

13

question.

14

Q Wasn't it more like his not wanting you to

15

call him at all?

16

A No. His tone of voice did not sound that way.

17

In addition, if you note, when I told him I wanted to get

18

this thing straight about the money, he asked me to sort of

19

keep it down. He asked me where I was calling from. He did

20

not want nobody to overhear.

21

Q Didn't he later say to you in this phone conver-

22

sation, which was recorded, that he had sworn to you pre-

23

viously, "I have looked you straight in the eye, I wasn't

24

trying to hit you over the head on this stuff and I just

25

don't understand it;" didn't he say that to you?

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* * *

1 should concern yourselves with at all is whether or not a
2 tax agent, in this case Agent Midgette, in his official
3 capacity was making an audit of the defendant's tax return
4 in order to determine whether or not taxes were due and owing
5 from the defendant to the United States, and whether, if
6 you believe it to be a fact, the alleged offer to bribe or
7 the alleged bribe itself was made to influence the agent's
8 decision in that manner.
9

10 It is completely immaterial if the agent was correct
11 or not correct in his conclusions as to the existence of
12 tax deficiencies in the Federal income tax return of Mr.
13 Levy.
14

15 The essence of the crime is the giving or offer-
16 ing of a bribe to a person acting on behalf of the United
17 States for the purpose of influencing his official conduct.
18 That is in Count 1. Obviously no one would give or offer
19 a thousand dollars unless he expected to gain some
20 advantage thereby for himself or for another.

21 I have already commented relative to Count 2.

22 The defendant contends that the transaction in
23 this case was induced by law enforcement officials,
24 specifically Agent Midgette. In short, the defendant ad-
25 vances a defense which the law terms entrapment. Under
this defense, if you find that no crime would have occurred

1 but for the conduct of the law enforcement officials, you
2 must acquit Mr. Levy of all charges.

3
4 Now, let us consider this defense. Law enforce-
5 ment officials in their efforts to enforce the criminal
6 laws and to apprehend those engaged in criminal activities
7 may resort to stratagems or deception. Such methods
8 are not in any way forbidden by law and are often necessary
9 in the detection and prosecution of certain crimes.

10 Whether or not you or I personally agree with the
11 policy of using such methods is not in issue and is not
12 before you. The fact that Government agents merely afford
13 opportunities or facilitates to one who is ready and willing
14 to violate the law when the opportunity presents itself
15 does not constitute entrapment.

16 When, for example, the Government has reasonable
17 grounds for believing that a person is engaged in unlawful
18 activity, it is not unlawful entrapment for a government
19 agency to offer to accept a thing of value from such sus-
20 pected person.

21 However, in their efforts to enforce the laws
22 government agents may not entrap an innocent person who,
23 except for the government's inducement, would not engage
24 in the criminal conduct charged.

25 Thus, if the criminal design originates with the

1 rdlk - 6

2 government agents and they implant in the mind of an
3 otherwise innocent person the disposition to commit the
4 crime charged and to induce its commission, the prosecution
5 may not succeed.

6 In short, entrapment occurs only when the criminal
7 conduct was the product of the creative activity of
8 government agents; that is, if they initiate, incite,
9 induce, persuade or lure an otherwise innocent person to
10 commit a crime or to engage in criminal conduct. And if
11 that occurs, the Government may not avail itself of the
12 fruits of those investigating activities. Such conduct
13 would offend the public conscience. And so while the
14 crime may have been committed, the Government is barred
15 from benefiting by the improper conduct of its own agents.

16 Here the defendant argues he was free of any
17 criminal purpose to make an unlawful payment of money and
18 that he had no previous disposition, intent or purpose to
19 engage in such criminal activity, but was induced and per-
20 suaded to engage in the activity charged against him by the
21 creative activity of a government agent. The Government
22 denies this and argues that the defendant was merely
23 afforded the opportunity to commit the offense and that he
24 readily and willingly responded thereto and engaged in the
25 transaction which is the subject of the indictment without

1 rdsrm

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2 inducement of any kind.

3 If you find some evidence that a Government agent,
4 by initiating the illegal conduct, induced the defendant to
5 engage in such conduct, then the Government must prove beyond
6 a reasonable doubt that the inducement was not the cause of
7 the crime; that is, that the defendant was ready and willing
8 to commit the crime without persuasion.

9 To sustain its burden of proof, the Government has
10 to satisfy you that, in fact, its agents have not seduced an
11 innocent person, but that, in fact, its agents have not seduced
12 an innocent person, but that the inducement which brought out
13 the offense charged here was an instance of the kind of conduct
14 which the defendant was prepared to engage in if given an
15 opportunity.

16 There has been testimony that the defendant made
17 a statement on August 20, 1974 tending to show his innocence.
18 The statement was allegedly made at the time the defendant
19 was first questioned on that date. Inspector St. Sure
20 testified that when the defendant was first questioned in the
21 vicinity of the Guarantee Lock Company, Inspector Lumis ad-
22 vised the defendant of his Constitutional rights. According to
23 Inspector St. Sure, Mr. Levy was then asked whether he had paid
24 any money to Agent Midgette to influence him in the conduct of an
25 audit. According to Inspector St. Sure, the defendant answered that
he did not pay any money to influence Agent Midgette in the

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

ALBERT LEVY,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

James A. Steele

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N. Y.

That on the 23d day of July 19 75 at 1 St. Andrews Place, N. Y., N. Y.

deponent served the annexed Brief & Appendix upon

Paul J. Curran

the U.S. Attorney-So. Dist in this action by delivering ² a true copy ²⁵ thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 23d

day of July 19 75

Print name beneath signature

JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1978